

**United States Bankruptcy Court
Central District of California
Northern Division
Ronald A Clifford III, Presiding
Courtroom 201 Calendar**

Friday, September 1, 2023

Hearing Room 201

10:00 AM

9: -

Chapter

#0.00

PLEASE TAKE NOTE:

On September 1, 2023, Courtroom 201 in Santa Barbara (Northern Division) will be closed for maintenance. Appearances for matters may be made in-person in Courtroom 5D in the Santa Ana Division (at Ronald Reagan Federal Building and U.S. Courthouse, 411 West Fourth Street, Santa Ana, California 92701).

Appearances for matters may also be made by video through ZoomGov, or by telephone through ZoomGov. If appearing through ZoomGov, parties in interest and members of the public may connect to the video and audio feeds, free of charge, using the connection information provided below. All persons that choose to appear in person must comply with all applicable Centers for Disease Control and Prevention (CDC) guidelines regarding the wearing of face coverings and physical distancing inside and outside of the courtroom. Parties should not enter the courthouse when feeling unwell, if they have tested positive for COVID-19, or if they fall within the quarantine recommendations after having come into close contact with someone who has COVID 19.

Individuals may participate by ZoomGov video and audio using a personal computer (equipped with camera, microphone and speaker), or a handheld mobile device (such as an iPhone or Android phone). Individuals may opt to participate by audio only using a telephone (standard telephone charges may apply).

Neither a Zoom nor a ZoomGov account is necessary to participate and no pre-registration is required. The audio portion of each hearing will be recorded electronically by the Court and constitutes its official record.

Video/audio web address: <https://cacb.zoomgov.com/j/1615492780>

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Docket 0

Tentative Ruling:

- NONE LISTED -

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9:23-10685 SMH Diversified, Inc.

Chapter 11

#1.00 HearingRE: [15] Motion State Court Receiver Kevin Singer's Notice of Motion and Motion to Dismiss Chapter 11 Case, or, in the Alternative, Excuse Receiver From Turnover Requirements of 11 U.S.C. § 543; Memorandum of Points and Authorities, Declaration of Kevin Singer, and Declaration of Mercedes Santana in Support Thereof with Proof of Service

Docket 15

Tentative Ruling:

September 1, 2023

Appearances required.

Background

S.M.H. Diversified Inc. dba Sunshine Food Mart (the "Debtor") was incorporated in 2014 by Shogy S. Ahmed ("Shogy"). *See* Docket No. 16, *Exhibit I*. Shogy and Hulad Saleh ("Hulad") are brothers, and Saleh Ahmed Saleh ("Saleh") is their father. *See id.* at *Exhibit C*, p. 2. At some point in or around 2020, a dispute arose amongst Shogy, Hulad and Saleh as to the ownership of the Debtor, and the ownership of the real property that the Debtor operates upon (the "Property"). *See id.* at *Exhibits A* through *D*. The dispute resulted in a series of complaints and cross-complaints among the Debtor, Shogy, Hulad and Saleh in the Superior Court for the State of California, County of Santa Barbara (the "State Court"), styled Case Nos. 20CV02931 and 21CV05006 (collectively, the "State Court Action"). *See id.* The State Court Action sought, among other things, (1) declaratory relief as to the ownership of the Property, (2) declaratory relief as to the ownership of the Debtor, and (3) an accounting for and turnover of profits of the Debtor. *See id.*

On December 19, 2022, at the request of Saleh and Shogy, the State Court entered in the State Court Action that *Order re Receiver's Ex Parte Application for Instructions Regarding Supplementing His Appointing Order to Include Clarification of His Authority and Compensation* (the "Receivership Order"). *See* Docket No. 16, *Exhibit H*. The Receivership Order provided that (1) "Kevin Singer is appointed receiver [] in this Action over Sunshine Food Mart (the "Business") and the real property commonly

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known as 719 West Laurel Avenue, Lompoc, California;" (2) "[t]o enter, gain access to and take possession of the Business; if necessary to exclude and remove Defendants [Hulad and Saleh];" (3) "to operate, manage and control the Business;" and (4) "Parties, and all persons and entities now in possession of any part of the Property and/or Business shall forthwith surrender the Business, Property, revenue, records, account receivable, keys, and security codes to the Receiver." *Id.*

Pursuant to the Receivership Order, Kevin Singer (the "Receiver") operated the Debtor and the Property from December 2022 through August 23, 2023. *See* Docket No. 15, pp. 17-18. On August 11, 2023 (the "Petition Date"), the Debtor, at Hulad's direction, filed a voluntary petition for relief pursuant to Chapter 11 of Title 11 of the United States Code (this "Case"). *See* Docket No. 1. The Debtor's Schedules list no executory contracts or unexpired leases, disclose seven (7) priority and non-priority unsecured creditors with amounts owed totaling \$791,652.71 (the Receiver is listed as being owed \$113,908.94), disclose one (1) secured creditor being owed \$31,203.64, and disclose assets of \$402,095.18. *See* Docket No. 21, *Schedules A/B, D, E/F and G.*

On August 24, 2023, the Receiver filed *State Court Receiver Kevin Singer's Notice of Motion and Motion to Dismiss Chapter 11 Case, or, in the Alternative, Excuse Receiver from Turnover Requirements of 11 U.S.C. § 543* (the "Motion"). *See* Docket No. 15. On August 24, 2023, this Court entered that *Order Granting Application and Setting Hearing on Shortened Notice*, which set the Motion for hearing on September 1, 2023. *See* Docket No. 18. The Motion seeks dismissal of this Case pursuant to 11 U.S.C. §§ 1112(b) and 305(a)(1), or an order excusing the Receiver from the requirements of 11 U.S.C. § 543. *See id.* at p. 2.

On August 30, 2023, the Debtor filed that *Opposition to State Court Receiver Kevin Singer's Notice of Motion and Motion to Dismiss Chapter 11 Case, or, in the Alternative, Excuse Receiver from Turnover Requirements of 11 U.S.C. § 543* (the "Opposition"). *See* Docket No. 27. Through the Opposition, the Debtor argues that the Receiver's cost in operating the Business is not sustainable on the Debtor's income, that the Receiver is not operating the Business appropriately, and Shogy and Hulad have agreed to terminate the Receiver. *See id.*

Request for Judicial Notice

Pursuant to Fed. R. Evid. 201(b), "[t]he court may judicially notice a fact that is not

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subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *See also Lee v. City of Los Angeles*, 250 F.3d 668, 688-689 (9th Cir. 2001)("[A] court may take judicial notice of 'matters of public record.'"); *Neylon v. County of Inyo*, 2016 WL 6834097 *2 (E.D. Cal. November 21, 2016)("Federal courts may take judicial notice of orders and proceedings in other courts, including transcripts").

Pursuant to Fed. R. Evid. 201(e), "[o]n timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed."

The Receiver's RJN

On August 24, 2023, the Receiver filed that *Request for Judicial Notice in Support of State Court Receiver Kevin Singer's Motion to Dismiss Chapter 11 Case, or, in the Alternative, Excuse Receiver from Turnover Requirements of 11 U.S.C. § 543* (the "Receiver's RJN"). *See* Docket No. 16. The Receiver's RJN requests that this Court take judicial notice of four (4) complaint and cross-complaints filed in the State Court Action, a minute order entered by the State Court, a brief filed in the State Court Action regarding the appointment of the Receiver, the Receivership Order and an earlier version of the order, the Articles of Incorporation for the Debtor filed with the California Secretary of State, and two (2) Statements of Information filed with the California Secretary of State. *See id.*

There has been no opposition to the Receiver's RJN, and the Receiver's RJN seeks judicial notice of the types of documents that this Court may take judicial notice of under Fed. R. Evid. 201. The Court takes judicial notice of *Exhibits A through K* of the Receiver's RJN.

The Debtor's RJN

On August 30, 2023, the Debtor filed that *Request for Judicial Notice in Support of Opposition to State Court Receiver Kevin Singer's Notice of Motion and Motion to Dismiss Chapter 11 Case, or, in the Alternative, Excuse Receiver from Turnover Requirements of 11 U.S.C. § 543* (the "Debtor's RJN"). *See* Docket No. 29. The Debtor's RJN requests that this Court take judicial notice of a stipulation filed in the State Court Action to terminate the Receiver, and eight (8) monthly reports filed by

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the Receiver in the State Court Action. *See id.* at p. 2. The Debtor's RJN requests that the Court take judicial notice of filings in the State Court Action, all of which are appropriate subjects for judicial notice under Fed. R. Evid. 201. The Court takes judicial notice of *Exhibits 1-9* of the Debtor's RJN.

Analysis

11 U.S.C. § 305(a)(1)

Pursuant to 11 U.S.C. § 305(a)(1), "[t]he court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if [] the interests of creditors and the debtor would be better served by such dismissal or suspension." "The courts that have construed § 305(a)(1) are in agreement that abstention in a properly filed bankruptcy case is an extraordinary remedy, and that dismissal is appropriate under § 305(a)(1) only in the situation where the court finds that both 'creditors and the debtor' would be 'better served' by dismissal." *In re Eastman*, 188 B.R. 621, 624 (9th Cir. BAP 1995); *see also In re Naartjie Custom Kids, Inc.*, 534 B.R. 416 (Bankr. D. Ut. 2015)("granting relief under § 305(a) is an 'extraordinary remedy,' and 'should be invoked sparingly.'"); *In re Macke Intern. Trade, Inc.*, 370 B.R. 236, 247 (9th Cir. BAP 2007). "The BAP has adopted the multi-factor test set forth in *In re Monitor Single Lift I, Ltd.*, 381 B.R. 455, 464-65 (Bankr. S.D.N.Y. 2008), to determine the best interests of the creditors and the debtor," stated as:

(1) the economy and efficiency of administration; (2) whether another forum is available to protect the interests of both parties or there is already a pending proceeding in state court; (3) whether federal proceedings are necessary to reach a just and equitable solution; (4) whether there is an alternative means of achieving an equitable distribution of assets; (5) whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case; (6) whether a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time consuming to start afresh with the federal bankruptcy process; and (7) the purpose for which bankruptcy jurisdiction has been sought.

In re Morabito, 2016 WL 3267406 *5 (9th Cir. BAP 2016); *see also In re Monitor*

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Single Lift I, Ltd., 381 B.R. at 425.

"The analysis is 'based on the totality of the circumstances.'" *Id.* at *6. "The bankruptcy court 'must make specific and substantiated findings that the interests of the creditors and debtor will be better served by dismissal or suspension.'" *Id.*

"The pendency of state law liquidation proceedings...is relevant to an abstention decision under section 305(a)(1). For instance...when the debtor has been in receivership for so long that the bankruptcy case would be duplicative and wasteful, courts have deferred to state courts and abstained under section 305(a)(1)." 2 *Collier on Bankruptcy* ¶ 305.02[2][c], at 305-8 to 305-09 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2017; *see also In re Packard Square LLC*, 575 B.R. 768, 779 (Bankr. E.D. Mich. 2017). "[Section] 305 provides that a bankruptcy court may dismiss a bankruptcy case or suspend proceedings within it in appropriate circumstances, which may include the pendency of state court receivership proceedings that appropriately serve the interests of involved parties." *In re Newport Offshore Ltd.*, 219 B.R. 341, 354-355 (Bankr. D.R.I. 1998); *see also In re Packard Square LLC*, 575 B.R. at 779.

Economy and Efficiency of Administration

The Debtor, through Hulad, argues that "[s]ince his appointment in December 2022, the Receiver has incurred fees and expenses totaling \$252,324.68, or an average of \$31,540.59 per month." *See* Docket No. 27, p. 3, lines 3-4. The Debtor through Hulad argues that Hulad should replace the Receiver in operating the Business, and has historically operated the Business for "a very reasonable management salary of between \$0 - \$75,000 per year." *See* Docket No. 28, p. 3, lines 5-9.

The Debtor explains what it believes the management fee would be under Hulad's direction, approximately \$6,250 per month (if the fee of \$75,000 per annum is still to be charged by Hulad). Yet, the cost of administration of this Case in addition to Hulad's management fee is not discussed in the Opposition. This case, at minimum, has an added layer of costs in the form of counsel to the Debtor and the SubChapter V Trustee's fees and expenses. Given the litigation surrounding the Debtor's ownership, there may be other experts and accountants that would need to be employed in this Case. What is more, based on the allegations in the State Court Action by Saleh, Shogy and Hulad, if this Case were to continue, it may very well be appropriate for

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this Court to appoint a Chapter 11 trustee (or convert this Case to Chapter 7). The parties have raised issues of mismanagement and theft regarding the operations of the Business prior to the Receiver's appointment. If the Court is to take the parties' contentions in the State Court Action seriously, how could it not appoint a Chapter 11 trustee (or convert the case to Chapter 7) to allow a neutral trustee to operate/liquidate the Debtor's assets for the benefit of the Debtor's creditors?

These costs would all be in addition to the costs to manage the Debtor's daily operations by Hulad. From April to July 2023, the Receiver's reported expenses have averaged \$25,800. *See* Docket No. 29-2, *Exhibits 6-9*. The Court is not convinced that the total administrative expenses that would accrue in this Case would total less than the expense of the Receiver in the State Court Action.

The State Court Action is based in an ownership dispute of the Debtor's equity and the Property. That dispute directly affects this Case, including who operates the Business and who provides direction to the Debtor and the Debtor's counsel in this Case. The parties are not on the same page on this issue, and have not been since the State Court Action was first filed many years ago. Shogy and Hulad may agree that Hulad may now operate the Business, but Saleh has not agreed to the same, and the State Court has not agreed that this is a sound idea given that the stipulation amongst just those two (2) parties to the State Court Action was set for hearing in October. It is not explained how there is any efficiency in having parallel cases in this Court and the State Court when both of cases require the resolution of underlying issues in the State Court Action.

This Court finds that the existence of this Case to the State Court Action only adds a material level of inefficiency both in the amount of administration and costs to the Debtor, and therefore its creditors.

*Whether Another Forum is Available to Protect the Interests of Both Parties
or There is Already a Pending Proceeding in State Court*

The State Court Action and the Receivership Order are currently protecting the interests of Shogy, Hulad, Saleh, the Debtor, and the Debtor's creditors. As to the ownership issues regarding the Debtor and the Property, that is squarely before the State Court in the State Court Action, and has been pending for years. All of the parties will benefit from the State Court's resolution of that issue. The State Court

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has taken the step of appointing the Receiver to ensure that the Business and the Property are appropriately managed, maintained, secured and operated while the State Court Action is being resolved. The State Court Action has been pending for nearly three (3) years, and the Receiver has been in place for more than eight (8) months. The Receiver is a neutral. He has been tasked with expelling all of the litigants from the Business, taking control of all of the Debtor's assets and the Property, and maintaining them as a neutral until the State Court orders him to do otherwise. The Debtor, though Hulad, argues that the Receiver has not paid multiple vendors, and that there are "various physical issues with the store." See Docket No. 28, pp. 4-5. The Receiver has reported to the State Court every month since the Receivership Order was entered, including accountings and pictures of the Business and the Property. See Debtor's RJN, *Exhibits 2-9*. There is no evidence before this Court that there have been any complaints lodged with the State Court regarding the job the Receiver has done in the more than eight (8) months that the Receiver has been in place. Rather, on July 14, 2023, Shogy and Hulad filed that *Joint Stipulation and Order to Terminate Receivership Immediately and Reappoint Hulad Saleh as Manager of Sunshine Market and Gas* (the "Stipulation"), which did not include Saleh's approval, and when the State Court set the matter for hearing, Hulad decided to end run the State Court and file this Case prior to the State Court hearing the Stipulation.

The Court finds that there is another forum that protects the interest of all parties-in-interest, the State Court, and the State Court Action had been pending years prior to the Petition Date. The Receiver had been in place for seven (7) months prior to the Petition Date.

Whether Federal Proceedings Are Necessary to Reach a Just and Equitable Solution

The State Court will ultimately resolve the ownership question related to the Debtor's equity and the Property. The Receiver will, unless the State Court orders otherwise, maintain the Business and the Property until those ownership determinations are made by the State Court. It is not out of the question that the State Court Action will be informally resolved altogether, as at least Shogy and Hulad have settled their differences.

It is not clear what the broker price opinion provided by the Receiver includes. That

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price could include the Business and/or the Property. If it is the Business, then the Debtor can pay its claims in full through a sale of the Business, with a dividend to equity. There could also be an equity call, if the determined owners are willing, to pay all claims in full.

The Debtor has but a handful of creditors, and does not appear to dispute those claims scheduled. Those creditors do not appear to be actively seeking collection of their claims from the Debtor. A claims reconciliation process and the automatic stay seem to be of no use to the Debtor at this juncture.

It should also be stated that this Case was not filed for the reason of repaying creditors. There were no collection actions by creditors against the Debtor within the year prior to this Case being filed. See Docket No. 21, *Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy*, p. 2. The Pok and Roy Tate claim relates to a "carryback loan on real property," seemingly related to the Property. The trade and sales tax debt is being paid in the ordinary course by the Receiver according to the Receiver's monthly reports. The Receiver has not demanded payment from the Debtor, and seems to have a plan to have those amounts paid. That leaves just the SBA Loan and the Wells Fargo Bank credit card. Neither of these creditors has filed a claim in this Case, or sued the Debtor in the past twelve (12) months. This Case was filed so Hulad might regain possession of the Debtor from the Receiver, and therefore Saleh and Shogy. That is a matter that the State Court Action is to properly resolve.

The jurisdiction of this Court over the Debtor is not required for a just and equitable result to be achieved between the alleged owner parties, the Debtor, and the Debtor's creditors.

Whether There is an Alternative Means of Achieving an Equitable Distribution of Assets

There are any number of ways a distribution of assets may be made to creditors. An out of court workout, a state law insolvency proceeding (i.e., an assignment for the benefit of creditors or receivership), a liquidation of the assets and payment to creditors directly by the Debtor or the Receiver, or a cash infusion by the to-be-determined equity holders of the Debtor are all means by which there can be an equitable distribution of the Debtor's assets to creditors of the Debtor, and, if

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appropriate, equity holders.

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Whether the Debtor and the Creditors are Able to Work Out a Less Expensive Out-of-Court Arrangement Which Better Serves All Interests in the Case

At least as to Shogy and Hulad it appears that an arrangement can be made to operate the Debtor for the benefit of the Debtor's creditors. The Court has no evidence that Saleh is agreeable at all to any arrangement that includes Hulad as a manager. Still, it is possible that a much less expensive alternative can be worked through outside of this Court to pay the relatively few creditors of the Debtor. The real question is that of ownership of the Debtor's equity, and that issue, unless there is a global settlement, must first be resolved by the State Court before any distribution to creditors can be made.

Whether a Non-Federal Insolvency has Proceeded So Far in Those Proceedings That It Would Be Costly and Time Consuming to Start Afresh With the Federal Bankruptcy Process

There State Court Action is not yet an insolvency proceeding. As noted *supra*, it is not clear to this Court that an insolvency proceeding will ever be required.

The Purpose for Which Bankruptcy Jurisdiction Has Been Sought

The primary purpose in filing this Case is clear. Hulad, and perhaps Shogy, seek to remove the Receiver from the Business, contrary to the very reasons the State Court appointed the Receiver in the first place. The Court is convinced from what it has read that if there were no receiver in place, there would be no bankruptcy case. The timing of the filing of this Case and the State Court's setting the Stipulation for hearing bare this fact out.

It also seems clear that this Case works an end run, at least in the short term, of Saleh's claim to the Debtor's equity.

The Court cannot at this juncture be certain who was authorized to file this Case, as ownership is in dispute. Perhaps a secondary goal was to remove the State Court Action to this Court to decide the ownership issue as well, but that would be a distant second to Hulad's goal of regaining control over the Debtor from the Receiver.

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Conclusion

Under the totality of the circumstances, the Court finds cause to dismiss the instant Case pursuant to 11 U.S.C. § 305(a)(1), with dismissal being in the best interest of the Debtor and the Debtor's creditors. Ownership of the Debtor's equity has not been decided, and remains an issue to be litigated in the State Court Action. The Receiver, which Saleh and Shogy requested, is in place to operate, maintain and secure the Business and the Property, and has so been in place for more than eight (8) months. The Receiver is regularly reporting to the State Court on the operations, maintenance and security of the Property and the Business, and the State Court is set to hear a request by Shogy and Hulad that the Receiver be terminated in October 2023. Until ownership is resolved by the State Court, it is unclear to this Court who of Shogy, Hulad and/or Saleh may authorize a filing in this Court, and who Debtor's counsel is appropriately taking direction from as it relates to the Debtor. The Court does understand that Hulad personally paid counsel's prepetition retainer. *See* Docket No. 21, *Disclosure of Compensation of Attorney for Debtor(s)*. While the Court could be convinced of disinterestedness, the funding of the pre-petition retainer by Hulad only further gives the Court reason to pause.

The Receiver is acutely aware of his costs to the Debtor, and made clear to the State Court in July 2023 that a liquidation may be in order while the ownership issue is sorted. Above all, this Court does not appreciate how this Case being advanced alongside the State Court Action is anything other than unnecessarily inefficient and administratively burdensome for the Debtor. Instead of just the Receiver's costs, the Debtor would need to incur the costs of general insolvency counsel, a SubChapterV trustee, and any other professionals required to advance this Case (including, perhaps a Chapter 11 trustee). These costs would be in addition to the costs of the Debtor in the State Court Action, where, again, the Debtor is a party, and replacement management for the Receiver.

As the Court is dismissing this matter under 11 U.S.C. § 305(a)(1), it does not reach the issues of 11 U.S.C. §§ 1112(b) or 543.

Movant is to upload a confirming order, attaching this ruling, within 7 days.

Party Information

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Debtor(s):

SMH Diversified, Inc.

Represented By
Reed H Olmstead

Movant(s):

Kevin Singer

Represented By
Sonia Singh

Trustee(s):

John-Patrick McGinnis Fritz (TR)

Pro Se

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9:23-10517 Global Premier Regency Palms Colton, LP

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#2.00 HearingRE: [55] Motion Debtors Motion For Order Authorizing Post-Petition Secured Loan Pursuant To 11 U.S.C. §§ 364(C)(1), (2), (3) AND (D)(1) On All Assets; Memorandum Of Points And Authorities

Docket 55

Tentative Ruling:

September 1, 2023

Appearances required.

Party Information

Debtor(s):

Global Premier Regency Palms

Represented By
Garrick A Hollander
Matthew J Stockl

Movant(s):

Global Premier Regency Palms

Represented By
Garrick A Hollander
Matthew J Stockl